No. 75-1704

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

MARTIN R. HOFFMANN, Secretary of the Army,
Appellant

v.

LOUIS J. FIOTO, ET AL, *Appellees*

On Appeal from the United States District Court for the Eastern District of New York

---

AMICUS CURIAE BRIEF OF THE UNITED STATES MERCHANT MARINE ACADEMY ALUMNI ASSOCIATION

PENROSE LUCAS ALBRIGHT
2306 South Eads Street
Arlington, Virginia 22202
Attorney for Amicus Curiae

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

(8395-1-77

INDEX

TABLE OF CITATIONS

Cases:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1704

MARTIN R. HOFFMANN, Secretary of the Army,
Appellant

v.

LOUIS J. FIOTO, ET AL, *Appellees*

On Appeal from the United States District Court for the Eastern District of New York

---

AMICUS CURIAE BRIEF OF THE UNITED STATES MERCHANT MARINE ACADEMY ALUMNI ASSOCIATION

(Filed With Written Consent of All Parties in the Case)

I

QUESTION PRESENTED

Whether Section 1331(c), Title 10, U.S. Code, as administered by appellant, is unconstitutional as violating the minimum requirements imposed by the

Equal Protection clause of the Fourteenth Amendment and, accordingly, also violates the Fifth Amendment?

II

INTEREST OF AMICUS CURIAE

Insofar as known, all alumni of the United States Merchant Marine Academy, Kings Point, New York, who served in the Nation's Merchant Marine during World War II were members of the United States Naval Reserve in one or more capacities, cadets, midshipmen, and officers. Many did not perform active duty in the Navy during the periods specified in 10 USC 1331(c)[1] which separately embrace World Wars I and II and the Korean War. Of these, a significant number, who have continued their active status in the Naval Reserve, will, except for the perpetual bar of § 1331(c), meet the qualifications for reserve retired pay upon reaching age sixty.

This alumni association has long recognized a need for corrective action in view of the potential of an unfair adverse application of § 1331(c) towards these wartime graduates of Kings Point. Although they are "in the same boat" as Fioto for the purposes of § 1331(c), the circumstances surrounding *why* they are *there* are quite different. In this connection, all our alumni were *required* to be in the Naval Reserve. Moreover, the casualty rate of merchant mariners ex-

[1] Hereinafter usually referred to as simply "§ 1331(c)." In its current form § 1331(c) provides that no person who was a "Reserve" of an armed force before August 16, 1945, is eligible for retired pay unless he performed active duty between April 5, 1917 and November 12, 1918, or September 8, 1940 and January 1, 1947, or June 26, 1950 and July 28, 1953.

ceeded that of any of the Armed Forces during World War II; they manned guns and fought the enemy on the front lines of the war at sea; and many were turned down in their attempts to be placed on active duty in the Navy during the war. Nothing has been found in the legislative history of the original act which manifests any Congressional intent or even an awareness of its adverse effect on our alumni.

Because of the impact which this Court's decision may have on our wartime alumni, we feel it important that the United States Merchant Marine Academy Alumni Association express its views in the instant case.

III

SUMMARY OF THE ARGUMENT

After careful review of the legislative history of Title III, Army and Air Force Vitalization and Retirement Equalization Act of 1948, Public Law 810,[2] 80th Congress, 62 Stat. 1081, and the last proviso of Section 302(a) in particular, we have concluded that the construction of this proviso by the three-judge district court, *Fioto* v. *Hoffman*, 409 F. Supp. 831, (D.C. N.Y. 1976), is a correct and wise one which is compatible with the intent of Congress as expressed in legislative history and which also constitutes a reasonable interpretation of the language of the original act. It is appellant's application of the act, not the act as such, which the lower court found unconstitutional.

Although, with the 1956 codification, the revised language, as such, became less amenable to interpreta-

[2] Hereinafter referred to as simply "PL810."

tion, the express legislative intent of the codification was to restate the law without change; thus § 1331(c) in its 1956 revised form should be construed to continue the original intent of the law. This construction, however, was not appreciated by the 85th Congress which amended § 1331(c) to its present form; nevertheless the purpose of its amendment, to place Korean War veterans in the same status as World War I and II veterans, was remedial and subject to liberal vice restrictive construction.

To construe the last proviso of Section 302(a) and the substituted § 1331(c) as providing a perpetual bar against qualification for reserve retirement pay by Reservists who did not serve on active duty during World War I or II (or later the Korean War) is unduly harsh and restrictive—especially insofar as our wartime alumni are concerned who were administratively and by the Merchant Marine Act, 1936, *required* to be members of the United States Naval Reserve. Our wartime alumni in answering the call of their country served in war zones, fought and many died to bring about total defeat of the enemy. We cannot, therefore, imagine any rationale for a law which would perpetually bar them from reserve retired pay while at the same time allowing a much greater number of civilians who were draft-deferred during World War II to qualify. If this was the intent of Congress, we think the result is an unconstitutional classification.

IV

DISCUSSION AND ARGUMENT

a. Facts.

(1) FIOTO SITUATION. The particular facts in *Fioto* are well laid out in the decision of the lower Court and

briefs heretofore submitted to this Court. Briefly, Appellee Fioto, served in the Army National Guard for a total of twenty-seven years, 1933 to 1940 and 1947 to 1967. Due to injuries resulting from an automobile accident in 1941, he did not serve during World War II; nor did he participate in the Korean War inasmuch as his unit was not called to active duty.

In anticipation of retirement, Fioto filed an application with the Department of the Army showing he satisfied each statutory requirement for retirement: (1) He was sixty years of age; (2) He had completed at least twenty years of satisfactory service as defined in the reserve retirement statute; and (3) He was not entitled to retirement pay from the Armed Forces under any other provision of law. The Army, however, denied his application on grounds that he was barred by § 1331(c).

(2) OUR SITUATION. With reference to the Merchant Marine during World War II, most Naval Reservists serving therein were appointed by authority of the Naval Reserve Act of 1938, (52 Stat. 1175). Under this act, the Naval Reserve was established as a component part of the United States Navy. The Reserve categories were the Fleet Reserve, the Organized Reserve, the Merchant Marine Reserve and the Volunteer Reserve. Under the specific heading "Merchant Marine Reserve," the act of 1938 provided in Section 318, 52 Stat. 1185, that the Merchant Marine Reserve was to be composed of those members of the Naval Reserve who follow, or have within three years followed, the sea as a profession or who are employed in connection with a seafaring profession, or men who are desirable for training for service on board public

vessels of the United States or other seagoing vessels documented under the laws of the United States as may be approved by the Secretary of the Navy. Under Section 319, 52 Stat. 1185, the Secretary of the Navy was authorized to prescribe a suitable flag or pennant to be flown as an emblem of the Merchant Marine Reserve on seagoing Merchant vessels documented under the laws of the United States under regulations as he prescribed, provided that the vessel was designated as suitable for service as a naval auxiliary in time of war and that the master or commanding officer and not less than fifty percent of the other licensed officers were members of the Navy or Naval Reserve. This provision was carried over in the Armed Forces Reserve Act of 1952, 66 Stat. 499, and is now codified as 10 USC 7225, 70A Stat. 447. However, the words "or Naval Reserve" were omitted as surplusage, since the Navy includes the Naval Reserve. *Explanatory Notes*, 10 USCA 7225.

Following enactment of the Naval Reserve Act of 1938, appointments were initially made as cadet, Merchant Marine Reserve, to students of the State maritime academies and the cadets of the United States Merchant Marine Cadet Corps. These young men were given six months subsequent to graduation in which to obtain appropriate licenses of the United States Merchant Service in order to qualify as commissioned officers in the Merchant Marine Reserve of the United States Naval Reserve; otherwise they were discharged.

It was (and still is) important for licensed officers in the American Merchant Marine be members of the United States Naval Reserve in view of specific requirements of an earlier act, the Merchant Marine

Act, 1936 (49 Stat. 1985). This act *required* that eligible Merchant Marine officers be members of the Naval Reserve.[3]

Membership in the Naval Reserve was (and is) thus made compulsory for deck and engineering officers eligible for such membership in two circumstances: (1) When employed in vessels on which an operating differential subsidy was paid under the act; and (2) When employed on vessels operated by the Maritime Commission (subsequently changed to the Department of Commerce) 49 Stat. 1993, 46 USC 1132(g).

In June of 1941, the Secretary of the Navy established a classification of midshipmen, Merchant Marine Reserve, in accordance with the Naval Reserve Act of 1938, and, the Secretary further authorized the Chief of the Bureau of Naval Personnel to appoint as midshipmen, Merchant Marine Reserve, all cadets, Merchant Marine Reserve, who were serving with vessels taken over by the Navy and who volunteered for active duty. In August of 1942, *all* cadets,

---

[3] It is also required that the Navy participate in the design and planning of Merchant vessels for possible conversion to naval auxiliaries. The "Declaration of Policy" of such Act provided that "it is necessary for the National Defense . . . that the United States shall have a Merchant Marine . . . capable of serving as a Naval and Military auxiliary in time of war and National emergency . . . and . . . manned with a trained and efficient citizen personnel."

Subsidy contracts were required to include the provision that licensed officers "who are members of the United States Naval Reserve shall wear on their uniforms such special distinguishing insignia as may be approved by the Secretary of the Navy." Such insignia is presently authorized under par. 0155-1a, United States Navy Uniform Regulations, 1969, to be worn by "members of the Naval Reserve serving on Merchant Ships."

Merchant Marine Reserve, were appointed midshipmen, Merchant Marine Reserve.[4]

The 30 June 1941 *Register of Commissioned Officers, Cadets, Midshipmen and Warrent Officers of the United States Naval Reserve,* listed the members of the Merchant Marine Reserve on pages 385 to 472. Included were one captain, five commanders, 760 lieutenant commanders, 1,074 lieutenants, 972 lieutenants (junior grade), 1,784 ensigns and some 879 cadets.

The Navy had plans to activate the Merchant Marine Reserve shortly after the entry of the United States into the war. However, President Franklin Delano Roosevelt personally decided against this action. Nevertheless, although not *formally* militarized, the Merchant Marine soon had many of the characteristics of an armed service. The most important was that its members fought and died on the front lines of the sea—particularly in the battle of the Atlantic.[5]

---

[4] U.S. Merchant Marine Academy cadet-midshipmen, were the only students from any of the then four (now five) federal academies who regularly served, as such, under combat conditions—participating in military operations in actual war zones. Two hundred, twelve names are listed on the War Memorial at Kings Point as having lost their lives in action during World War II.

[5] To illustrate, Convoy PQ-17 (sometimes known as the "Fourth of July" Convoy), seven days out Reykjavic, Iceland, on July 4, 1942, included thirty-three Merchant ships (of which twenty were American freighters) which, while sailing into enemy infested waters, were ordered to scatter and proceed independently to Archangel, USSR. To the chagrin of many of the Naval officers and men involved, two battleships (HMS Duke of York, USS Washington), four cruisers (HMS London, HMS Norfolk, USS Wichita, USS Tuscadoosa) and six destroyers escorting the Convoy PQ-17 were ordered to proceed West at high speed leaving the Convoy PQ-17 unprotected. Fighting their way through hostile

Maritime Service uniforms were provided (Merchant Marine ships' officers and seamen trainees) which were similar to Navy uniforms, but with distinctive insignia. Appointments to various Navy type grades were made in the United States Maritime Service by the Commandant of same under Regulations promulgated by the Administrator, War Shipping Administration. (E.O. 9054, 7 F.R. 837; E.O. 9188, 7 F.R. 5383)

Although the U.S. Navy supplied armed guard crews for American Merchant ships, these naval personnel were supplemented by the ship's crews. Many gun positions were manned completely by Merchant seamen. Combat bars and certain medals were authorized which were different from those of the Armed Services. 57 Stat. 81. Absentee voting for the Armed Forces and Merchant Marine was covered by the same statute. 58 Stat. 136. Under international treaty Merchant Marine officers and seamen were entitled to POW status, 36 Stat. 2387, 2388. They were subject to Court Martial.[6] For the criminal purposes of 18 USC 2387 (See 54 Stat. 670), the master, crews and officers of Merchant vessels in the service of the Army or Navy were included in the "military and naval forces of the United States."

An outstanding example of heroism of the Navy and Merchant marine personnel fighting together to

---

submarines and aircraft, only eleven of the merchant vessels arrived in Russia with but 70,000 tons out of 190,000 tons of valuable war cargoes with which they had departed Reykjavic. *The Seafarers in World War II*, J. Bunker 1951; *Sea War*, F. Riesenberg 1956.

[6] See *Forgione* v. *U.S.*, 100 F. Supp. 239 (D.C.Pa. 1951), *affirmed* 202 F.2d 249, *cert. den.* 345 U.S. 966.

sink a German raider and to damage another was the battle of the S.S. STEPHEN HOPKINS, a liberty ship, which occurred on September 27, 1942, with the German auxiliary cruiser, the STIER and the German supply freighter TANNENFELS. The Navy Armed Guard crew manned the single 4-inch gun of the HOPKINS against six 5.9-inch guns of the STIER, the Armed Guard crew being killed or wounded until the Armed Guard officer, Ensign Kenneth M. Willett, USNR, manned the gun alone. After Ensign Willett was badly wounded by a magazine explosion under the gun turret, Engineering Cadet Midshipman, Edwin J. O'Hara, who had just escaped from the blazing engine room, took over the gun. With the magazine below in flames, O'Hara manned the gun alone and loaded and fired the last five rounds in the ready magazine scoring hits on the TANNENFELS and the STIER which sank. R. Vargus, *The Gallantry of "The Ugly Duckling"* American Heritage, December 1969.

The President, in an address to Congress on January 7, 1943 included a number of tributes to American merchant seamen in the contest of their military role:

> "The heroes, living and dead . . . . of the North Atlantic Convoys."
>
> "Of continued importance in the year of 1942 were the unending, bitterly contested battles of the Convoy routes . . ."
>
> "Any review of the year 1942 must emphasize the magnitude and diversity of the military activities in which this Nation has become engaged. As I speak to you approximately one and one-half million of our soldiers, sailors, marines and flyers are in service outside our continental limits, all through the world. Our merchant seamen are

> carrying supplies to them and to our allies over every sealane."[7]

President Truman in an address at a Navy Day celebration in New York, Oct. 27, 1945, stated:

> "On opposite sides of the world, across two oceans, our Navy opened a highway for the armies and air forces of the United States . . . . Together with their brothers in arms in the Army and Air Forces, and with the men of the Merchant Marine, they have helped to win for mankind all over the world a new opportunity to live in peace and dignity—and we hope, in security." *Public Papers of President Harry S. Truman,* 1945, item 178.

The price of the World War II Sealift was high. Over 600 U.S. flag ships were lost. Some 5,662 American merchant seamen lost their lives at sea or died in prisoner-of-war camps; there were 572 released prisoners of war; and another 500 men died while serving on foreign flag vessels under U.S. control. The losses of the American Merchant Marine lives proportionately exceeded those of the U.S. Navy by a substantial extent.[8]

---

[7] H.D. par. 1, 78th Cong. 1st Session.

[8] The *World Almanac*, 1964 p. 739; see also: *Merchant Marine Naval Reserve Bulletin* No. 1, May 1946, p. 4. Employment on U.S. Flag vessels in 1940 was 49,800; in 1945 it was 158,900, 93rd Congress, 1st Session, House Document 93-78 (Part 2), U.S. Bureau of Census *Historical Statistics of the United States, Colonial Times to 1970*, p. 748. Vice Admiral Land stated on October 17, 1945 that 215,000 then manned the fleet, 7,500 lost their lives and 30,000 were torpedoed. *Report of War Shipping Administrator.* Hearings before the Committee on the Merchant Marine and Fisheries, House of Representatives, 79th Congress, on HR 2346, p. 80.

In the early stages of World War II, merchant vessels were requisitioned for the Navy to serve as naval auxiliaries and the officer and crew members aboard who were members of the Naval Reserve were placed on active duty to serve with the ship. These men included cadets who were ordered to active duty as midshipmen, U.S.N.R., and remained assigned to the ships until their sea tour was completed. However, as officer candidate courses of the Navy began to bear fruit and while there was a continued scarcity of qualified mariners, many requests for active duty by merchant marine officers were turned down. These officers were considered more valuable where they were.[9]

After termination of hostilities, a "Certificate of Substantially Continuous Service in the United States Merchant Marine" was issued pursuant to Public Law 87, 78th Cong. (57 Stat. 162) which gave reemployment rights to persons who served in the American Merchant Marine subsequent to May 1, 1940. Further, under the seal of the United States, President Truman issued a document suitable for framing, affirming the

[9] With practically any group of our World War II alumni, several will testify how they requested active duty in the Navy and were turned down for this reason. The pay scales of Merchant seafarers were established by the government at levels which together with bonuses for war zones were substantially higher than for comparable grades of the Armed Services on a day-by-day basis. Although this was considered necessary to maintain the Merchant Marine as a volunteer force, it has been unquestionably a cause of continuing friction between those serving in the Merchant Marine and those serving in the Armed Forces. Ironically, however, when fringe benefits such as leave, mustering out pay, hospitalization, disability retirement, PX and Commissary benefits and, particularly veterans' benefits are considered, the mariners' compensation was undoubtedly inferior to that of the Armed Forces personnel. See: *The Two-Ocean War*, S. Morison, p. 133; *Sea War*, F. Riesenberg, Jr., pp. 100-104.

"heartfelt thanks of the Nation" individually to those "who answered the call of your country and served in the Merchant Marine to bring about the total defeat of the enemy." Still further, a lapel device, about the same size but distinctive from, the lapel insignia given to those discharged from the Armed Services, was issued to Merchant Marine veterans.

b. Legislative History of Public Law 810, the Army and Air Force Vitalization and Retirement Equalizaton Act of 1948

The exclusionary language applied by the Army in *Fioto* is the last proviso in Section 302(a) of PL 810 which, as originally enacted, read as follows:

> "*Provided* further, that no person who was a member of a reserve component on or before August 15, 1945, shall be eligible for retirement benefits under this title unless he performed active Federal service during any portion of either of the two periods beginning April 6, 1917, and ending November 11, 1918, and beginning September 9, 1940, and ending December 31, 1946."

Although Appellant attempts to establish that the 80th Congress intentionally, by this proviso, created a perpetual bar to Reserve retirement pay to individuals who fall within its ambit, we agree with the lower three-judge court that, in fact, there is simply no persuasive evidence in the legislative history that Congress intended any pre-1940 service would create a perpetual bar to future benefits.

The problem faced by Appellant (to find Congressional intent in the last proviso of Section 302(a) to create a perpetual bar to reserve retirement pay) is that such proviso did not exist in a form which barred Fioto until minutes before the conclusion of the Sen-

ate hearings. Indeed, this proviso did not exist in *any* form until H.R. 2744 was considered by the Senate. Then, until amended on the last day of the Senate hearings, the exclusion applied only to individuals who were members of a reserve component *on* August 15, 1945. Not until page 77 in the last day, June 8, 1948, of the Senate hearings on HR 2744, were the words "or before" added so that the proviso related to individuals who were members of a reserve component *on or before* August 15, 1945. This occurrence is referred to and quoted in part on page 11 of the Brief for the Appellant. A more complete quotation is as follows:

> "Our next amendment is on page 23, line 11, member of a reserve component on, and insert the words 'or before.' This is to make certain that no one who drops out of the reserve to avoid service in the war is qualified under the bill. This is concurred in by the services and Reserves. Page 23, line 11, put in the words 'or before' in front of the date August 15, 1945.
>
> Senator Tydings: So it reads 'on or before August 15, 1945.' "I move the adoption of it."

Following this, the amendment was accepted as indicated by the text of the act as passed.

The context of earlier testimony on the same day, pages 69-71, leads to the impression that the Senators' prime interest was the costs of the retroactive features of H.R. 2744 and retroactive retirement credit was excluded by this proviso. In the context of the hearings, the page 77 amendment, as such, does not change this impression. The senators were concerned about crediting past Reserve service for those who had not served in World War I or World War II. This is

what was being discussed and the conclusion is reasonable that the exclusion or disqualification generating the last proviso of Section 302(a) as finally amended was intended to relate only to the retroactive credit. If the contrary were intended, it is far from clear. Neither the subsequent Senate Report nor the debates and remarks concerning the HR 2744 add any enlightenment.

It is further to be noted that the proviso does not use the word "retired pay" or "retirement" as otherwise found in Section 302(a); rather it refers to "retirement benefits under this title."

In Section 304, using the same words "retirement benefits," it is stated that for members who fail to conform to the prescribed standards and qualifications, they may be "retired without pay if qualified for such retirement" and such "action shall effect a termination of such person's right *to accrue retirement benefits under this title* but shall not affect any rights which have accrued prior to the time that such action shall have been taken with respect to such person." (Emphasis added) Most logically the "retirement benefits" being accrued were "points" and "Satisfactory Federal Service" authorized by the Act. Section 305, in contrast, is specific where it speaks of "eligibility of such persons to receive * * * any *retired pay* payable under this title." (Emphasis added)

The same language, "retirement benefits" is again to be found in Section 309 of PL 810 wherein it is stated that no person shall be ordered to active Federal service for the sole purpose of "qualifying for retirement benefits under this Title." Here too, the meaning

of "retirement benefits" is compatible with "points" or "Satisfactory Federal Service."

From the foregoing, it is difficult to avoid an interpretation that "retirement benefits" as employed in the original legislation were not intended to be synonymous with "retirement" or with "retired pay." Further, the use of "retirement benefits" throughout the act is consistent as meaning an earned fringe benefit which may eventually lead to retirement and retirement pay. If one asks, "What are the 'retirement benefits' of the position?" The answer is likely to comprise information of what it takes on a continuing basis to become eligible for retirement pay. Such an answer would evince a meaning coincident with "retirement benefits" as used throughout Title III of PL 810.

It is not suggested that this is the only meaning which may be ascribed generally to "retirement benefits." A person already retired might have an entirely different perspective of the meaning. The point is that the original text of the last proviso of Section 302(a) is not wholly "unambiguous" as asserted on page 10 of the Brief for the Appellant. Room for interpretations of the language *does* exist.

Still further, no great difficulty is perceived to construe the last proviso of Section 302(a) as retroactive only in barring *gratuitous* retirement credit rather than retroactive and prospective. The proviso, if construed to bar *earned* retirement credit, is obviously harsh; in effect it affirmatively blackballs a well-defined group by reason of a previous condition from ever qualifying for reserve retirement pay. It is thus restrictive and punitive in nature. It is, of course, a well recognized tenet of legislative interpretation that

penal statutes are to be construed strictly. See *Commission* v. *Acker*, 361 US 87 (1959).

In view of the foregoing, it will be appreciated that if only the original act is considered, constitutional issues need not be reached in *Fioto;* rather the matter is one of relatively straight forward statutory construction. Unfortunately, subsequent codification and amendment of the proviso as so codified complicates the issue.

c. Subsequent Legislative History

Statutes relating to the Armed Forces were revised and codified by the act of August 10, 1956, set forth in 70A, Statutes at Large. Section 49 of such act, 70A. Stat. 640, provides that it was the legislative purpose to reinstate, without substantive change, the law replaced by those Sections on the effective date of the act. Nevertheless, in the codification, it will be noted that language "retirement benefits" in the last provision of Section 302(a) was changed to "retired pay" in Section 1331(c) of Chapter 67 of Title 10, United States Code. In marked contrast, the exact same language "retirement benefits" became "computation of years of service" in codifying section 304 to become (in part) Section 1334(b), Title 10, United States Code. In recognition of the original intent of the last proviso of Section 302(a) of the 1948 Act, its codification in § 1331(c) undoubtedly should be construed to have the same effect.

Subsequently, the codification constituting Section 1331(c), Title 10, United States Code, 70A Stat, 102, however was amended by Public Law 85-704 of August 21, 1958, 72 Stat. 702, to make persons who performed

active duty (other than for training) after June 26, 1950, and before July 28, 1953, eligible for Reserve retired pay. It will be noted that the 1958 legislation restated subsection (c) in its entirety, incorporating, however, the amendment. The legislative history of this amendment may be found in Senate Report No. 2188, August 15, 1958, House Report No. 1984, June 25, 1958, and Hearings on Sundry Legislation affecting the naval and military establishment (HR 781) before the House Committee on Armed Services, 85th Congress, Second Session commencing at page 7896. Here, one Colonel Zehola explained that the proposed legislation related to persons who were employed in the Merchant Marine, in the Federal Bureau of Investigation, or as commercial airline pilots or in defense work and, because of the critical nature of their employment, were not ordered to active service in World War II, but who later performed active service in the Korean War.

Although there seemed to be some initial confusion as to the exact purpose of the proposed legislation by various committee members, in the end (mislead by the codification it is believed) it is clear beyond peradventure they interpreted Section 1331(c) (before Congress amended it) permanently to bar persons having Reserve service prior to August 16, 1945, who did not serve on active duty in World War I or II, from ever qualifying for reserve retired pay.

One member of the Committee, Mr. Van Zandt, expressed a special dislike for merchant marine veterans of World War II. Thus, on page 7904 of the House Hearings, he stated:

> "I see red every time I mention these people [merchant marine officers] because of my experience in the Pacific with them."

Albeit with misguidance, the 85th Congress may have created a perpetual bar to a well-defined group by reason of previous condition from qualification for reserve retirement pay through its amendment to Section 1331(c), Public Law 85-705.[10] If this be the result, not only are constitutional problems concerning the Fourteenth and Fifth Amendments involved but specters of a bill of attainder and/or an expost facto law are raised. The high water mark of this Court on bills of attainder is *U.S.* v. *Brown*, 381 US 437 (1965) wherein a law making it a crime for a communist to hold certain union positions was found (in a five to four decision) to be a bill of attainder. In a similar fashion, the 85th Congress may seen as blacklisting merchant marine veterans who were Reservists in World War II (unless they served in the Korean War) for eligibility for reserve retired pay and as a further measure, divesting them of retired benefits they might have accrued in the preceding ten years by Reserve participation. Of course, a statute need not be criminal to constitute a penal statute, particularly if such intent is indicated by the legislative history. See *Trop* v. *Dulles*, 356 US 86, 95 (1958).

---

[10] On the other hand, Congress considered the H.R. 781 Amendment to be remedial, not punitive, and except for the addition of the Korean War veterans as an exemption to the exclusion, the language in 10 U.S.C. 1331(c) is unchanged by the Amendment. Hence, to construe the language more strictly by reason of an amendment intended to be beneficial would seem to pervert the *general* Congressional intent.

Further, the 1958 legislation in dispossessing merchant marine veterans who were also in the Naval Reserve during World War II of their earned reserve retirement credit had an effect similar to the Hiss act which was judicially determined to be ex post facto law. It will be recalled that the Hiss act prohibited payment of pensions to former employees who falsely testified in matters involving national security. *Hiss* v. *Hampton,* 338 F.Supp. 1141 (D.C. D.C. 1972).

d. Applicable Interpretations of the Fourteenth Amendment

To construe the last proviso of Section 302(a) as a perpetual bar against persons who come within its exclusionary terms against ever qualifying for reserve retirement pay is a clearly unconstitutional classification unless it serves a rational and valid governmental purpose. The provision creates several different classifications. First, it divides the reserve community into veterans of World Wars I and II and non-veterans of those wars. In addition, it distinguishes among such non-veterans with one classification being those who were in the reserve before August 16, 1945; another classification being those who first came in the reserve on or after August 16, 1945; and a third classification being those who first entered the Reserve on or after August 16, 1945, but had prior peacetime regular service.

The following chart may be helpful:

Classification	Retroactive retirement credit	Prospective retirement credit (Army construction)	Prospective retirement credit (District Court construction)
Veteran, WWI and/or II	Yes	Yes	Yes
Reservist before August 16, 1945, not WW I or II Veteran	No	No	Yes
Regular before August 16, 1945, not WW I or II Veteran	Yes	Yes	Yes
Reservist first after August 15, 1945 and before PL 810 effective date not WW I or II Veteran	Yes	Yes	Yes
Reservist first after Public Law 810 effective date	No	Yes	Yes

Appellant argues that the overriding purpose of Congress in enacting Public Law 810 was to preserve the Reserves as an effective secondary fighting force that would be available for immediate activation in time of military need and to achieve this end, it was necessary to make the Reserves attractive both to men with wartime experience and to a newer generation of men who had been too young to serve during World War II. Thus, appellant states that it was reasonable to exclude men who were not on active duty during World War II because they neither offered the youth nor the wartime experience Congress sought. Further, appellant, apparently understanding that there is little to differentiate in youth between one who first entered the Reserve August 15, 1945, and another who first

entered August 16, 1945, pointed out that Congress is entitled to employ broad statutory classifications which do not have to be made with mathematical nicety.

A second similar theory of rationality offered by appellant is that Congress was primarily interested in the prospective creation of a strong reserve force and it made it retroactive primarily as a gratuity for individuals who had served during World War I and World War II.

The fatal flaw in appellant's theories is that there is no legislative history to suggest that the last proviso, Section 302(a), PL 810, was for the purpose of discouraging older men (excluding World War I and II veterans) from serving in the Reserve. And, assuming *arguendo* this had been an intention of Congress in passing Public Law 810, § 1331(c) manifestly fails to constitute a rational legislative vehicle to this end. To the contrary, by giving gratitous retirement credit for Regular service, it actually encouraged *older* men—men who had been in Regulars in the Armed Forces before August 16, 1945, but who did not serve in World War I or II (and thus completed service before December 7, 1941)—to become Reservists. Still further, the proviso offers no discouragement to the much greater number of persons who were deferred from the draft and were thus in a purely civilian capacity in World War II in contrast to Reservists who were not called but were at all times subject to call.[11]

[11] For every Merchant Marine officer or cadet who was a Naval Reservist (50,000 is a *very* liberal estimate) there must have been at least 400 civilians deferred by the World War II draft. One deferred Reservist for every one thousand deferred civilians would be a more conservative (and probably accurate) estimate. See U.S. Bureau of Census, *Historical Statistics of the United States, Colonial Times to 1957*, p. 735.

Of interest, on page 70 of the Senate Hearings on HR 2744, *supra*, the Chairman gives the example of a person commencing his accrual of retirement points at age 25. In 1948 this was about the median or average age of our alumni who had served in World War II.

Had Congress desired to make age a limiting factor, it would have been easy so to have provided. For example, in Section 2107, Title 10, United States Code, for eligibility for the Senior ROTC program a member must be under 25 years of age on June 30 of the calendar year in which he becomes eligible under the Section for appointment as an ensign in the Navy or as a second lieutenant in the Army, Air Force or Marine Corps as the case may be. In Section 504, Title 10, United States code, original enlistments in the Regular Components of the Armed Forces are limited to able bodied persons who are not less than 17 years of age nor more than 35 years of age. Naval Academy midshipmen must be at least 17 and not have passed their 22nd birthday on July 1st of the year they enter the Academy. 10 USC 6958, 70A Stat. 431.

It is thus submitted that there is neither intrinsic nor extrinsic basis in § 1331(c) from its legislative history that it was rationally intended, or, in fact, would, prospectively encourage a more youthful reserve than would occur in its absence. It would seem equally arguable that the opposite result was intended.

If a perpetual exclusion were intended by the last proviso of Section 302(a), it is submitted that the motivation was simply what it seems to be on its face, that is a retribution against those who were in the reserve (or had been in the reserve) and did not serve

on active duty during World Wars I and II. And there is no redeeming rationale for this particular discrimination against such Reservists vis-a-vis the much greater number of civilians deferred from the draft during World War II. The first could have been called to active duty any time desired. The second would have to be drafted. The first had been trained. The second were without training. The first, if our alumni, had generally encountered the rigors and dangers of war. The second generally had not. Many in our group asked for active duty during World War II; those in the second group in all probability did not. Both were equally liable for service under the Selective Service Act of 1948 enacted June 24, 1948 62 Stat. 604. Both (later as Reservists) were preferred for recall by the Armed Forces Reserve Act of 1952. 66 Stat. 489. By no stretch of the imagination can such a scheme be called rational.

A similar scheme was held to be an unconstitutional classification in *Thompson* v. *Gallagher,* 489 F2d 443 (5 Cir. 1973) involving an ordinance which required employees of the city who were veterans with less than an honorable discharge to be discharged from employment. The Circuit Court in holding the classification to be unconstitutional noted that it divided employees of the city into veterans and nonveterans. In addition, it distinguished between veterans with honorable discharges and those with other than honorable discharges. The Court noted that numerous factors which have absolutely no relationship to one's ability to work as a custodian in a power plant may lead to a discharge which is other than honorable. Thus, the Court found that the general category was too broad to be called reasonable when it leads to an automatic dismissal

from any form of municipal employment. Subsequently, in *Rios* v. *Dillman,* 499 F.2d 329 (5th Cir. 1974) the same court noted on page 333, referring to *Thompson,* that a "statute that bars *all* employment has a substantially different effect from one that simply grants an advantage to some otherwise qualified for employment, . . ."

On page 20 of appellant's brief, it is stated that Congress made virtually the same distinction in § 1331(c) that this Court sustained as rational in *Johnson* v. *Robinson,* 415 US 361 (1974). In such case, Congress distinguished between military service and alternative civilian service for the purpose of eligibility for educational benefits from the Veterans Administration. The classification was upheld by this Court on the grounds that military veterans suffer far greater loss of personal freedom and become subject to the discipline and potential hazardous duty of the military establishment.

Although the rationale is hardly applicable to our alumni who, on the average, were subject to even more hazardous duty than members of the Armed Forces during World War II and who also were subject to military discipline, there is a vital distinction in that Robison was not necessarily *perpetually* barred from becoming eligible for Veterans Administration educational benefits. Had he so desired and his conscience permitted, the option was presumably open to him to enter on active duty whereby he could become eventually eligible for such benefits.

Appellant also cites *Richardson* v. *Belcher,* 404 U.S. 78 (1971), *Weinberger* v. *Salfi,* 422 U.S. 749 (1975) and *Marshall* v. *U.S.,* 414 U.S. 417 (1974).

Richardson involved a reduction of social security disability benefits where, added to State workmen's compensation, the total benefits exceeded 80% of the individual's average current earnings. This Court found a rational basis for this formula in a Congressional desire to avoid duplicate payments for disability and not to lead to the weakening of State programs. Without belaboring the matter, the case seems consistent with the lower court's decision in *Fioto* which approves *less* retired pay for the Reservist by not counting his pre 1940 service, but does not bar him *completely* from eligibility to receive retired pay.

In *Weinberger,* there was clear legislative history that Congress intended that a marriage be of at least nine months duration before the widow's social security benefits were authorized. This was to insure that the marriage was bona fide and not sham merely to gain elibility for such benefits. This Court found this duration-of-relationship test met constitutional standards inasmuch as it protected against the abuse and was justified by the difficulties of individual determinations. Again, the case is inapposite. The rationality which may be found in *Weinberger* simply does not exist in the instant case wherein Fioto had the prerequisite duration-of-relationship, 20 years, but would be disqualified by Appellant by reason of prior condition.

Marshall, on the other hand, seems more pertinent inasmuch as it involved a statute which *perpetually bars* the benefits of the Narcotic Addict Rehabilitation Act to individuals having two prior felony convictions. The rational purpose for this two-prior-felony exclusion was to keep hardened criminals out of the pro-

gram. But certainly, no fine sense of judgment is required to conclude that a perpetual exclusion of the benefits of the reserve retirement program because of honorable prior reserve service has no rational comparability to the perpetual exclusion of hardened criminals to a drug addict rehabilitation program.

The Brief for the Appellant dwells chiefly on the specific facts in *Fioto.* Appellant may therefore contend that with our wartime alumni, Congress had or could have had, other valid reasons for their exclusion from retired pay. This is anticipated to some extent on pages 15 and 16 of the Brief for the Appellant wherein it is argued that it was reasonable for Congress to consider past history in assessing the likelihood that such individuals would perform active duty during future wars if induced to remain in the Reserve by the promise of retired pay.

Thus, appellant might allege that inasmuch as many Naval Reservists in the Merchant Marine were not placed on active duty in World War II, there is no purpose served by an incentive to retain them in the Reserve. Another argument might be that inasmuch as the Merchant Marine Act, 1936 (46 USC 1132(g)), requires, or at least strongly encourages, eligible deck and engineering officers to be in the Naval Reserve, another incentive to the same end serves no useful purpose. The fallacy of both rationales is that it is not "merchant marine officers," as such, who are barred and no rational basis exists to differentiate on these grounds between our World War II alumni and those entering the program subsequently who also became members of the Naval Reserve, but who are not barred from qualifying for reserve retired pay. They too, are required administratively and by the Merchant Marine Act, 1936, to be members of the Naval Reserve.

Further, of course, if the occupation of the Reservist was the reason for the bar, then the bar should be eliminated with a change in the Reservist's occupation. Moreover, the continuous screening of the Ready Reserve to eliminate those having critical civilian skills is required by another statutory provision, 10 USC 271, 69 Stat. 599, 72 Stat. 1438.

Appellant may charge that the World War II Merchant Marine Reservists who were all volunteers, who fought their ships so long as they floated to the last round of ammunition and through waters considered too dangerous for the Navy's mightiest warships, and whose killed-in-action rate exceeded that of any Armed Force, needed no special incentives to serve again when their courage and fortitude was called for. Although this conclusion may hold more than a germ of truth, many other Americans at the same time continuously risked their lives to defeat the enemy; they can be similarly charged. Such, dedication, it is submitted, defies rational classification.

On objective analysis, we can only regard the last proviso of Section 302(a), as appellant construes it, as an undesirable, unfair and unearned discrimination against many of our alumni. Although we do not believe that the 80th Congress so intended, the end result to our alumni adversely affected by the legislation seems to place them in the same company as felons and in a caste below communists.

It is submitted that the issue under the Fourteenth Amendment as to whether an unconstitutional classification exists by reason of the perpetual bar of § 1331 (c) is not close; it is totally without a rational basis having any connection to the purpose of the act involved.

e. U.S. District Court Jurisdiction Over Retroactive Retirement Pay

So far, few, if any, of our alumni affected have reached age 60 whereby they might qualify for *retroactive* retirement pay and therefore the contentions submitted by appellant on pages 21-25 of his brief are not of direct interest. However, the issue is probably more technical than real inasmuch as this Court's affirmance of the three-judge court decision below for Fioto or otherwise finding § 1331(c) to be an unconstitutional classification will undoubtedly be recognized by all agencies of the Federal government including the departments of the various Armed Services and the General Accounting Office (31 USC 71) in like cases. Further the jurisdiction of the Court of Claims under 28 USC 1491 to award back retirement pay arising under an act of Congress is longstanding.

CONCLUSION

The judgment of the District Court should be affirmed at least insofar as it has determined Section 1331(c), Title 10, United States Code, as administered by appellant, to be an unconstitutional classification in violation of the Fourteenth and Fifth Amendments.

Respectfully submitted,

PENROSE LUCAS ALBRIGHT

Attorney for United States Merchant Marine Academy Alumni Association

Of Counsel:

MASON, MASON & ALBRIGHT
2306 South Eads Street
Arlington, Virginia 22202
(703) 979-3242